SYLVIA BAIZ
California State Bar No. 124367
964 Fifth Avenue, Suite 214
San Diego, California 92101
Telephone: (619) 544-1410
Facsimile: (619) 544-1473

Attorney for Defendant **Trapero-Zazueta**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HON. DANA M. SABRAW**)

UNITED STATES OF AMERICA, Plaintiff, v. **JESUS TRAPERO-ZAZUETA**, Defendant.	Criminal No. 07-CR-3415-DMS STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

I.

STATEMENT OF FACTS

The statement of facts and the facts discussed in the memorandum of points and authorities, are strictly for the purposes of this motion and are not to be considered admissions by the defendant, Jesus Trapero-Zazueta. Mr. Trapero-Zazueta expressly reserves the right to contradict, explain, amplify, or otherwise discuss any of the facts mentioned here at trial.

According to the complaint and limited government reports received to date, on Saturday, December 8, 2007 agents began surveillance of a campsite located at th "Midway Campground area of the Imperial Sand Dunes." Located at the campsite were a recreational motor home which appeared to be a rented motor home from "Cruise America," a Ford pick up and a unspecified number of all terrain vehicles (ATVs). Agents stated they became suspicious because the motor home and the pick up were parted in a "v" formation, that the persons at the camp were just sitting around on lawn chairs and not riding their off highway vehicles(OHV's), they saw a buggy that had been seen on previous occasions, "engaged in drug smuggling activity based on "citizens." "Several other unknown individuals were observed by me driving up to the came and departing a short time later. The four individuals also made repeated trips into the nearby outhouse and would remain inside for an extended period of time."

Several hours later after dark at about 8:20 p.m, agents observed Mr. Trapero extinguish the campfire while Marin Lozano-Vargas departed the area on an ATV with his lights out. Then apparently with their "night vision scopes" agents witness an undisclosed number of ATVS with their lights off and several bundles attached enter the campsite and load the bundles onto a flat bed trailer that was apparently attached to the motor home. Later they saw Mr. Trapero, defendant Lozano Vargas and defendant Christian Maria Rodriguez remove the bundles form the flatbed train and walk around a corner out of sight toward the 2007 the motor home. After this was done agents indicated Mr. Trapero the restarted the campfire. The complaint in this matter indicates this happened two additional times during that night. At about 11:50 p.m. that same night of December 8, 2006, agents arrested the five persons named in the complaint without a warrant and also without a warrant searched the motor home in which all had been resting.

Mr. Trapero made statements to agents as to how he apparently got to the campsite and that he had no knowledge of the marijuana agents said they found.

II.

MOTION TO COMPEL DISCOVERY

Mr. Trapero requests the following discovery pursuant to Fed. R. Crim. P. 12(b)(4) and 16:

(1) all written and oral statements made by Mr. Trapero. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of Mr. Trapero are contained. It also includes the substance of any oral statements which the government intends to introduce at trial. Mr. Trapero specifically also requests

copies of audio or visual recordings of any statements made by him. These are all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). Mr. Trapero also requests any response to any Miranda warnings which may have been given to him. See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982);

(2) all documents, statements, agents' reports, and tangible evidence favorable to Mr. Trapero on the issue of **guilt or punishment** and/or which affects the credibility of the government's case. Mr. Trapero specifically requests **dispatch tapes or recordings related to communications amongst government agents observing and attempting to arrest Mr. Trapero**. Mr. Trapero specifically also requests the surveillance logs referred to in agent reports of the activities of December 7,8, 9 2007 of him or the other defendants and of the campsite in which they were arrested. This evidence must be produced pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), and United States v. Agurs, 427 U.S. 97 (1976);

(3) all evidence, documents, records of judgments and convictions, photographs and tangible evidence, and information pertaining to any prior arrests and convictions or prior bad acts. Mr. Trapero specifically requests any evidence demonstrating that he previously evaded checkpoints or border patrol agents. Evidence of prior record is available under Fed. R. Crim. P. 16(a)(1)(B). Evidence of prior similar acts is discoverable under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609;

(4) all evidence seized as a result of any search, either warrantless or with a warrant, in this case, including the moto home in which Mr. Trapero was arrested and all of its contents.. He also specifically requests copies of all photographs, videotapes or recordings made in this case. This is available under Fed. R. Crim. P. 16(a)(1)(C);

(5) all arrest reports, investigator's notes, memos from arresting officers, sworn statements and prosecution reports pertaining to Mr. Trapero's arrest. These are available under Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(i);

(6) the personnel file of the interviewing agent(s) containing any complaints of assaults, abuse of discretion and authority and/or false arrest. Pitchess v. Superior Court, 11

Cal. 3d. 531, 539 (1974). In addition, the defense requests that the prosecutor examine the personnel files of all testifying agents, and turn over Brady and Giglio material reasonably in advance of trial. United States v. Henthorne, 931 F.2d 29, 30-31(9th Cir. 1991). If the prosecutor is unsure as to whether the files contain Brady or Giglio material, the files should be submitted to the Court, in camera. Id. The prosecution should bear in mind that there exists an affirmative duty on the part of the government to examine the files. Id.;

(7) any and all statements made by any other charged or uncharged defendants. The defense is entitled to this evidence because it is material to preparation for the defendant's case and potentially Brady material. Also, insofar as such statements may be introduced as co-conspirator statements, they are discoverable. Fed. R. Crim. 16(a)(1)(C) and Brady. This evidence must be produced pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976); Mr. Trapero also requests copies or any other evidence of co-defendant's statements to review for purposes of whether a motion to sever any other defendant's is appropriate. See United States v. Tootick, 952 F.2d 1078 (9th Cir. 1991); United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977); United States v. Echeles, 352 F.2d 892 (7th Cir. 1965).

(8) Mr. Trapero requests copies of any and all audio/video tape recordings made by the agents in this case and any and all transcripts, including taped recordings of any conversations of any of the agents involved in this case. This evidence is available under Fed. R. Crim. P. 16(a)(1)(C);

(9) Mr. Trapero specifically requests the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Tucker, 716 F.2d 583 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses).

(10) all other documents and tangible objects, including photographs, books, papers, documents, photographs, or building or places or copies of portions thereof which are

material to Mr. Trapero's defense or intended for use in the government's case-in-chief or were obtained from or belong to Mr. Trapero. Mr. Trapero also requests access to all his personal belongings seized, including his wallet, any clothes he was wearing at the time of his arrest and any baggage he had with him. Rule 16(a)(1)(C);

(11) all results or reports of scientific tests or experiments, or copies of which are within the possession, control, or custody of the government or which are known or become known to the attorney for the government, that are material to the preparation of the defense, including the opinions, analysis and conclusions of experts consulted by law enforcement including finger print specialists in the instant case. Mr. Trapero specifically request information regarding the weight or confirmation of the substance alleged to be marijuana in the instant case. These must be disclosed, once a request is made, even though obtained by the government later, pursuant to Fed.R.Crim.Pro. 16(a)(1)(D).

(12) any express or implicit promise, understanding, offer of immunity, of past, present, or future compensation, agreement to execute a voluntary return rather than deportation or any other kind of agreement or understanding between any prospective government witness and the government (federal, state and local), including any implicit understanding relating to criminal or civil income tax liability. United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986); United States v. Risken, 788 F. 2d 1361 (8th Cir. 1986); United States v. Luc Levasseur, 826 F.2d 158 (1st Cir. 1987);

(13) any discussion with a potential witness about or advice concerning any contemplated prosecution, or any possible plea bargain, even if no bargain was made, or the advice not followed. Brown v. Duggen, 831 F.2d 1546, 1558 (11th Cir. 1986) (evidence that witness sought plea bargain is to be disclosed, even if no deal struck); Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985);

(14) any evidence that of any witnesses who were with Mr. Trapero at the time of his arrest or information that any prospective government witness is biased or prejudiced against the defendant, has a motive to falsify or distort his or her testimony or is prejudiced against

Mexican people. Pennsylvania v. Ritchie, 480 S.Ct. 39 (1989); United States v. Strifler, 851 F.2d 1192 (9th Cir. 1988);

(15) any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction. See Rule 608(b), Federal Rules of Evidence and Brady;

(16) any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir.), cert. denied, 474 U.S. 945 (1985); and,

(17) any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. July 11, 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980);

(18) the name and last known address of every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a government witness. Mr. Trapero specifically requests any notes, reports or recordings of any statements made by material witnesses who were released. United States v. Cadet, 727 F.2d 1469 (9th Cir. 1984);

(19) the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Tucker, 716 F.2d 583 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses);

(20) the name of any witness who made an arguably favorable statement concerning the defendant or who could not identify him or who was unsure of his identity, or participation in the crime charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); James v. Jago, 575 F.2d 1164,

1168 (6th Cir. 1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1975);

(21) Mr. Trapero requests a transcript of the grand jury testimony and rough notes of all witnesses expected to testify at the motion hearing or at trial. This evidence is discoverable under Fed. R. Crim. P. 12(i) and 26 and will be requested pursuant to

(22) Jencks Act Material. The defense requests all material to which defendant is entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including dispatch tapes. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under §3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991), the Ninth Circuit held that when an agent goes over interview notes with the subject of the interview the notes are then subject to the Jencks Act. The defense requests pre-trial production of Jencks material to expedite cross-examination and to avoid lengthy recesses during the pre-trial motions hearings or trial. Mr. Trapero specifically requests rough notes regarding the interview of Mr. Trapero, especially if the notes reflect the time and place of those statements. Mr. Trapero puts the government on notice that he will seek rough notes of any and all testifying agents on the date set for the motion hearing, and requests that the agent/witnesses be instructed to bring the notes to court.

III.

MOTIONS TO SUPPRESS EVIDENCE IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS.

Mr. Trapero-Zazueta moves to suppress his statements, and the evidence seized from him, as the fruits of his illegal arrest and detention. He also moves to suppress his statements as involuntary and obtained in violation of Miranda.

A. Agents Lacked Probable Cause To Arrest Mr. Trapero-Zazueta.

Mere presence at the scene of a crime is not a crime, and aside from Mr. Trapero-Zazueta's presence at the arrest site, the agents had no evidence linking Mr. Trapero-Zazueta with the knowing possession of marijuana.. A warrantless arrest in public may be made only if police have probable cause to believe that the suspect has been or is committing a criminal offense. Carroll v. United States, 267 U.S. 132 (1925). Probable cause to arrest exists when an arresting officer has facts within his knowledge sufficient to warrant a prudent person in believing that the person had committed or was committing a crime. United States v. Robertson, 833 F.2d 77, 780 (1987); Beck v. Ohio, 379 U.S. 89, 91 (1964); United States v. Jennings, 468 F.2d 111 (9th Cir. 1972).

Furthermore, the government has the burden of proving the lawfulness of the warrantless arrest. United States v. Strikler, 490 F.2d 378, 380 (9th Cir. 1974). The standard for probable cause is an objective one. The subjective good faith of the officer is not dispositive. United States v. McDowell, 475, F.2d 1037, 1039 (9th Cir. 1973). Moreover, the Supreme Court, in Beck v. Ohio, issued a warning that warrantless arrests are especially subject to scrutiny because,

> an arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, to likely to be subtly influenced by the familiar shortcomings of hindsight judgment.

Beck, 379 U.S. at 96 (holding that unspecified reports and information that defendant was a gambler along with knowledge of the defendants appearance and gambling record did not constitute probable cause to arrest defendant).

The Court must first determine whether there was a full custodial arrest. Among the circumstances that courts can consider in making the determination of whether there has been an arrest are:

1. the officer's intent in stopping the citizen (see e.g. Sibrion v. New York, 392 U.S. 40, 46-7 (1968);
2. the duration of the detention, Dunaway v. New York, 442 U.S. at 206-16;
3. the impression conveyed to the citizen as to whether he or she was in custody or only briefly detained for questioning, United States v. Estrada Lucas, 651 F.2d 1261 (9th Cir. 1980);
4. the questions, if any, asked, United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir 1980); and
5. the extent of any search performed, Ibarra v. Illinois, 444 U.S. 85, 93 (1979).

See also, Benitez-Mendez v. INS, 752 F.2d 1309 (9th Cir. 1984) (placing individual in vehicle was a seizure); United States v. Moreno, 742 F.2d 532 (9th Cir. 1984) (initial detention escalated into arrest without probable cause). In this case, there is no dispute that Mr. Trapero-Zazueta was arrested after 11:50 p.m. on December 8, 2007 at the desert campsite along with the other four defendants here without a warrant. This was more than three hours after agents stated they observed large bundles being offloaded to a trailer at the campsite. The arrest occurred prior to Mr. Trapero-Zazueta's interrogation and the search of his person. Thus, to justify his arrest, the government must show probable cause based upon the facts known to the agents shortly after they arrived on the scene.

The Ninth Circuit recently decided on facts much more compelling than those in Mr. Trapero-Zazueta's case that probable cause to arrest and search was clearly lacking. United States v. Huguez-Barron, 954 F.2d 546, 551-552 (9th Cir. 1992). In Huguez-Ibarra the defendant's residence had been under surveillance because a citizen complained regarding a "high level of vehicular traffic outside of Huguez's residence." Over the course of several months, the agents noted in excess of forty cars at the residence, some of which were registered to individuals reputed to be "affiliates" of narcotics organizations. The agents followed and stopped several of the cars, questioned the occupants and searched their vehicles. Generally, the agents found nothing, but a narcotics detector dog alerted to suitcases inside one of those cars on one occasion. Agents also observed as many as eight individuals enter and leave the residence sometimes empty handed and sometimes carrying boxes or bags. They also noticed "activity" around some vehicles, but were not able to discern what was going on. Id at 549. In finding that, the agents lacked probable cause to search the residence the court held "[w]hile such evidence is certainly relevant, it alone is not sufficient to transform otherwise legal (albeit suspicious) activity into circumstances supporting probable cause." Id, at 551.

In another case with facts similar to those presented here, the Ninth Circuit held an arrest invalid when the only basis for the arrest was the defendant's proximity to criminal activity. United States v. Robertson, 833 F.2d 777 (9th Cir. 1987). In Robertson the Drug Enforcement Agency (DEA) received information that a man named Johnson was manufacturing methamphetamine. The DEA also discovered an existing and valid warrant for Johnson. When they executed the warrant, the DEA agents noticed a woman, named Steeprow, leaving Johnson's house and arrested her. The court held that probable cause for Steeprow's arrest was wanting and stated that "Lacking from both the arrest warrant for Johnson and the search warrant for the premises was the slightest indication that Steeprow was involved in criminal activity. Her mere presence on the premises, without more, cannot support an arrest of her under these circumstances." *Id.* at 782. The holding in Robertson was reaffirmed in United States v. Del Vizo, 918 F.2d 821 (9th Cir. 1990) where the Court observed:

> Of course, a person's mere proximity to others engaged in criminal activity is insufficient to establish probable cause to search or arrest that person..

918 F.2d 826 n.7.

The Del Vizo Court also cited United States v. Vaughan, 718 F.2d 332 (9th Cir. 1983), another case with similarities to the present case. In Vaughan the defendant was riding in a car with two subjects with outstanding arrest warrants for conspiring to distribute and smuggle large quantities of drugs. While the others were being arrested, Vaughan attempted to walk away with a soft-walled vinyl briefcase he had with him. He was ordered to freeze at gunpoint and his briefcase was searched. The Court ruled that Vaughan's mere presence in a car with two drug conspirators did not give rise to probable cause to arrest. The agents were justified in detaining Vaughan briefly while they secured the two prisoners named in the warrants, but they had no right to search his briefcase, either as an incident to his arrest, or as part of a Terry frisk.[1] In particular, the Court noted that, at the time of his arrest, "for all the agents knew at the time they detained Vaughan and searched his briefcase, he could have been a hitchhiker. Thus, no probable cause existed..." 718 F.2d 333-335. *See also* United States v. Arrellano-Rios, 799 F.2d 520, 521-522 (9th Cir. 1986) (affirming Vaughan and illustrating the sort of additional circumstantial information necessary to give rise to probable cause to arrest a mere passenger). Yet another factually similar case which holds that mere presence does not give rise to probable cause is United States v. Prieto-Villa, 910 F.2d 601 (9th Cir. 1990). Prieto was at the premises were a consensual search was conducted. The Court ruled that his presence in a house where drugs, weapons and cash were found was not enough, alone, to justify an arrest. 910 F.2d 604-605.

---

[1] Because the briefcase was softwalled and thin, the agents could have felt it for weapons. Thus, the more intrusive procedure of opening it to examine its contents warranted suppression. 718 F.2d at 335.

When examining the basis for the arrest in this case, the court must not only consider the type of facts known to the officer, but also whether those facts were particular to Mr. Trapero-Zazueta. In United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 175), the Ninth Circuit held that "founded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." Id. at 241 (holding that the fact that defendant was Mexican was not sufficient for founded suspicion). Likewise, probable cause must be so **particularized** that the officer has probable cause to believe that a **particular** person, the defendant, had committed a crime or was in the process of committing a crime, rather than indiscriminately sweeping up **everyone** in the area of the crime in a mass arrest. The government has the burden of proving the lawfulness of the warrantless arrest. United States v. Strikler, 490 F.2d 378, 380 (9th Cir. 1974). The standard for probable cause is an objective one. The subjective good faith of the officer is not dispositive. United States v. McDowell, 475 F.2d 1037, 1039 (9th Cir. 1973).

In this case, the arresting officers knew, at most: that Mr. Trapero-Zazueta was present at the campsite and that (although all the following took place in the dark and they stated they used night vision scopes) had allegedly extinguished and restarted the campfire and had assisted in moving large packages from a trailer to an unknown location. As the cases above demonstrate, these facts do not amount to probable cause. In fact, this case is not even close. As in Huguez-Ibarra and Robertson mere proximity to other suspected of illegal activity is not enough to establish probable cause to arrest or search. There is certainly no evidence, other than his proximity, his extinguishing and restarting the campfire and his alleged carrying of a bundle to show his involvement in possession of marijuana with intent to distribute it. Furthermore, if the government believed that there was probable cause to arrest Mr. Trapero, why was a warrant not secured since they had allegedly believed the defendants were engaged in drug smuggling three hours prior to their arrest. Thus, the agents lacked probable cause to arrest him, and all evidence obtained as a result of the arrest must be suppressed.

B. Mr. Trapero-Zazueta's Statements Must Be Suppressed.

Discovery sheds no light on the manner in which Mr. Trapero-Zazueta's statements were obtained. Government reports merely contain the conclusory statement that Mr. Trapero-Zazueta was advised of his rights that he agreed to speak with the interrogating agents. The government has not provided the defense with any waiver forms presented to or executed by Mr. Trapero-Zazueta, or the text of the warning administered to him. Indeed, it is not possible to determine from the government's discovery precisely when Mr. Trapero-Zazueta was interrogated, what his status was at the time, or under what circumstances the interrogation occurred. What is known is that Mr. Trapero-Zazueta was interrogated by agents and he made statements.

It is the government's burden, upon challenge by the defendant, to establish the admissibility of any custodial statement obtained from a defendant. Mr. Trapero-Zazueta puts the government to its proof on this issue. Custodial interrogation conducted to secure incriminating statements from an accused must be preceded by procedural safeguards. Miranda v. Arizona, 348 U.S. 437 (1966). Once a person is in custody, Miranda warnings must be given before any interrogation. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to . . . counsel." Miranda v. Arizona, 384 U.S. at 475. No evidence or statement obtained through a custodial interrogation may be used at trial unless and until the government demonstrates that the defendant received Miranda warnings prior to the statement and validly waived her rights. Id. 384 U.S. at 479.

If the government contends that Mr. Trapero-Zazueta waived his Fifth Amendment rights, it must prove that he did in fact waive his rights. The government's burden, in proving a valid waiver of Miranda, is high. 384 U.S. at 475. This Court must "indulge every reasonable presumption against waiver" of Miranda rights. United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984). The validity of the waiver "depends . . . 'upon the particular facts and circumstances surrounding [the] case, including the background, experience and conduct of the accused.'" Edwards v. Arizona, 451 U.S. 477, 482, reh'g denied, 452 U.S. 973 (1981) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

In addition to proving Miranda warnings and a valid waiver, the government must also establish, by a preponderance of evidence, that any statement was given voluntarily. Lego v. Twomey, 404 U.S. 477, 484 (1972). This is a separate requirement: a confession admitted in violation of Miranda violates a defendant's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel; a coerced confession also violates a defendant's right to due process of law. See Jackson v. Denno, 378 U.S. 368, 376 (1964).

A voluntary statement is one which is the product of a "rational intellect" and a "free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). No one factor is determinative. Rather, this Court must look to the "totality all of the surrounding circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Among the many factors which the Court can weigh is the age of the accused, his education and intelligence, advice as to constitutional rights, length of detention, repeated and prolonged nature of the questioning and use of physical punishments. 412 U.S. at 226. A statement may not be admitted if because of mental illness, drugs, or intoxication, the statement was not the product of a rational intellect and a free will. Gladden v. Unsworth, 396 F.2d 373, 380-81 (9th Cir. 1968).

When law enforcement officers use psychological pressure to break down the will of an accused, all statements elicited thereby are deemed involuntary. See Spano v. New York, 360 U.S. 315 (1959). A confession is involuntary whether it occurs by physical intimidation or psychological pressure. Townsend v. Sain, 307 U.S. 293 (1963). Subtle psychological coercion, either by promises of leniency or indirect threats, may also render a confession involuntary. United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

In the instant case, Mr. Trapero-Zazueta made several statements after his arrest. He was in custody at the time the agents took his statements. Therefore, the government bears the burden of proving that Mr. Trapero-Zazueta: 1) was fully advised of his Miranda rights; 2) freely, voluntarily and knowingly waived these rights; and 3) made the statement freely and voluntarily.

To establish the legality and admissibility of the defendant's statements, the government must show compliance with Miranda v. Arizona and establish by a preponderance of the evidence that the defendant's statement was given voluntarily. An evidentiary hearing in this matter is thus necessary. United States v. Batiste, 868 F.2d 1414 (9th Cir. 1989) (holding that a district court has complete discretion to hold an evidentiary hearing whenever a Fourth Amendment violation is alleged and in footnote 5, implying that an evidentiary hearing must be held if a Fifth Amendment violation is alleged). In addition, Title 18 U.S.C. §3501 requires a hearing on voluntariness prior to the admission of any defendants' statement.

IV.

MR. TRAPERO REQUESTS LEAVE TO JOIN IN MOTIONS FILED BY CO-COUNSEL

Mr. Trapero respectfully requests the opportunity to join in motions filed by co-counsel that may be applicable to him. At this juncture it is unknown to Mr. Trapero what motions will be filed by co-counsel and he is not able to specifically determine what motions he wishes to join in. He requests that he be allowed to join in as soon as all motions have been filed.

V.

LEAVE TO FILE FURTHER MOTIONS

Because counsel for Mr. Trapero-Zazueta has not received all discoverable matters at the time the instant motions were drafted, he respectfully requests that he be allowed time to file such additional pretrial motions as may become apparent and necessary, including a motion to sever his trial from that of the co-defendants'.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the court grant the above motions.

Respectfully submitted,

Date: January 11, 2008

/S/Sylvia Baiz
SYLVIA BAIZ
Attorney for Mr. Trapero-Zazueta